U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 December 2004

CASE NO: 2004-BLA-5329

In the Matter of:

JESSE RAY WARD (Deceased)
Claimant

v.

CONTINENTAL MINING COMPANY, INC.
Employer

and

WEST VIRGINIA COAL WORKER
PNEUMOCONIOSIS FUND
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Sandra Fogel, Esq.
For the Claimant

Robert Weinberger, Esq.
For the Employer/Carrier

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under this Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Charleston, West Virginia on August 24, 2004 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-34; Claimant's exhibits (CX) 1-6 and Employer's exhibit (EX) 1 were admitted into evidence. Claimant and Employer filed timely post hearing briefs.

ISSUES

I. Existence of pneumoconiosis.

II. Causal relationship between pneumoconiosis and coal mine employment.

III. Total disability.

IV. Causation of total disability.

V. Length of Employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Procedural History

Jesse Ray Ward (Claimant or miner) filed a claim for benefits on August 14, 2001. (DX 2). On May 22, 2003 the district director awarded benefits, and Employer requested a formal hearing. (DX 28, 29). The claim was referred to the Office of Administrative Law Judges on November 26, 2003. (DX 32). The miner died on March 11, 2004 and his wife, Wilma Ward, has continued his claim as his personal representative. (TR 5).

Background

Claimant was born on November 3, 1937, and had one dependent, his wife, Wilma Ward. (DX 2/11). The employer has stipulated to twenty years of coal mine employment. (TR 5). Claimant claims twenty-four years of coal mine employment. (TR 5/DX 32). Ms. Ward testified at trial that the miner's breathing problems began in the mid 1980s, and by the year 2000, he could only walk about twenty feet. (TR 10-12). Claimant used inhalers, oxygen and nebulizer to treat his breathing problems, and was placed on the lung transplant list in December of 2003.

[1] The following abbreviations have been used in this decision and order: TR = transcript of hearing; BCR = board-certified radiologist; and B = b-reader.

(TR 12-16). Claimant's last coal mine job was that of a roof bolter. (DX 6). This job involved crawling fifty to one hundred feet, lifting fifty to one hundred pounds, and running machinery. (DX 6). The miner had reported that he had bent over one hundred bolts a day, rock dusted fifty pound bags, carried the bags two hundred feet, shoveled ribs and belt, and set timber. (DX 15). Claimant quit smoking in 1972 and smoked less than a pack a day since he was fifteen. (TR 11/ DX 15, 26).[2] The miner died on March 11, 2004. (CX 4).

Medical Evidence

The following summary is of all the evidence of record.

Chest x-rays

Exhibit	X-ray Date	Physician	Interpretation
DX 17	10/8/01	Patel, BCR, B	2/2, t/u
DX 27	10/8/01	Wiot, BCR, B	2/2, t/q
CX 1	10/8/01	Ahmed, BCR, B	2/2 t/q
CX 2	10/8/01	Cappiello BCR, B	2/3, q/t
DX 26	1/29/03	Zaldivar, B	No evidence of pneumoconiosis
CX 3	1/29/03	Cappiello BCR, B	2/3, q/t

Pulmonary Function Studies

Exhibit	Date	Height	Age	FEV1	FVC	MVV
DX 17	10/18/01	67"	64	2.47	2.83	92
DX 26	1/29/03	68"	65	1.86 1.89*	2.16 2.11	--- ---

*results post-bronchodilator

Blood Gas Studies

Exhibit	Date	PCO2	PO2
DX 17	10/8/01	33 37*	77 46*
DX 26	1/29/03	37 35*	71 45*

*exercise values

[2] Claimant's wife testified that he quit smoking a year or two after their marriage, Dr. Zaldivar reports the same in his report, but Dr. Rasmussen lists 1986 as the year that the miner quit.

Medical Reports

Dr. Donald L. Rasmussen, a pulmonary specialist, examined the miner on October 8, 2001 for the Department of Labor. (DX 15). The miner's last coal mine job was listed as a roof bolter, and Dr. Rasmussen's report provided great detail of the miner's employment duties involving heavy labor. Claimant suffered from frequent colds, pleurisy, and attacks of wheezing and was prescribed a Combivent inhaler. Claimant's current complaints included sputum, wheezing in the evening, cough and chest pain with exertion. The miner was dyspneic after one flight of stairs. On examination many bilateral inspiratory crackles in mid lung zones were heard. Claimant reported that he had smoked less than a pack of cigarettes a day from 1953 to 1986.[3] Claimant underwent an x-ray, blood gas studies and pulmonary function studies. The x-ray revealed category 2 pneumoconiosis according to the interpretation by Dr. Patel. The blood gas studies showed marked impairment in oxygen transfer and minimal resting impairment. The ventilatory studies demonstrated a normal lung capacity and a moderate increase in residual volume. Dr. Rasmussen diagnosed pneumoconiosis based on dust exposure history and x-ray evidence. He also diagnosed chronic bronchitis and diffuse interstitial fibrosis based on the physical exam and his chronic productive cough. Dr. Rasmussen found coal dust exposure caused all three conditions and smoking contributed to the latter two. Dr. Rasmussen also noted that the miner's fibrosis could be idiopathic. Claimant's marked loss of lung function caused his inability to perform his last coal mine employment. Dr. Rasmussen found coal dust exposure to be a major contributing factor to the miner's total disability.

Dr. George L. Zaldivar, who is board certified in pulmonary medicine, examined the miner on January 29, 2003 and issued a report on February 12, 2003. (DX 26). Claimant's social history disclosed that the miner was a pack a day smoker from age fifteen to 1972. The miner suffered from one flight dyspnea, and a daily cough which was, at times, productive of white sputum. Claimant used a nebulizer, an inhaler, and oxygen. Dr. Zaldivar found that the miner suffered from severe pulmonary fibrosis with honeycomb formation, a moderate irreversible restriction of vital capacity, severe diffusion impairment, a slightly elevated carbon monoxide level, and abnormal exercise test with severe drop in oxygenation. Dr. Zaldivar found no evidence of pneumoconiosis, and diagnosed a severe pulmonary impairment and fibrosis unrelated to coal mine employment. He noted that "to better characterize this fibrosis, a lung biopsy should be performed" as well as a CT scan.

Dr. Rhett Cohen, who is board-certified in internal medicine and sub-specializes in pulmonary diseases, reviewed the medical evidence of record and issued a report on July 7, 2004. (CX 6). Dr. Cohen diagnosed pneumoconiosis based on the miner's exposure history before dust suppression regulations, the miner's total exposure history, and the substantial "historical, physical, physiological, and pathological evidence of pneumoconiosis" found in the record. The miner's fibrosis could not be idiopathic pulmonary fibrosis, Dr. Cohen opined, because such a diagnosis requires the absence of environmental causes, and this miner had a coal dust exposure history. The miner's symptoms and examinations were consistent with chronic lung disease. Claimant's pulmonary function studies demonstrated a severe restrictive lung disease, a moderate to severe diffusion impairment, and hypoxemia with exercise. Dr. Cohen

[3] This end date is a decade later than reported by his wife and to Dr. Zaldivar.

determined that the miner was unable to perform his last coal mine employment due to his pulmonary impairment.

Dr. Rosalie M. Uht, who is board-certified in pathology, performed the miner's autopsy and issued a report on March 12, 2004. (CX 5). Dr. Uht reported the cause of death was respiratory failure due to end stage pulmonary fibrosis (honeycomb lung), diffuse pulmonary fibrosis with end-stage honeycomb change, diffuse alveolar damage (hyaline membrane disease) and patchy organizing pneumonia, and bilateral visceral and parietal pleural plagues. Secondary causes were listed as pulmonary hypertension grade 4/6, and atherosclerosis. Dr. Uht found mixed dust fibrosis in the lung parenchyma, and stated that "[c]ertainly, a component of mixed dust fibrosis is present, however the possibility of superimposed usual interstitial fibrosis cannot be excluded." The gross description listed the presence of focal fibrotic scars and tan brown parenchyma with severe diffuse fibrosis, emphysematous changes, bronchiectasis and anthracosis. Microscopic diagnosis also included anthracosis and anthracosilicotic nodules.

Dr. Erika C. Crouch, who is board-certified in pathology, issued a report on June 18, 2004. (EX 1). Dr. Crouch reviewed the autopsy report and slides. Dr. Crouch found non-specific entrapment of dust, no definite dust macules, and no nodules or lesions. Dr. Crouch determined that the miner had chronic organizing pneumonia with extensive honeycombing consistent with usual interstitial pneumonia. Additionally, Dr. Crouch discovered diffuse alveolar damage, fibrous pleural plaque, and coal dust deposition. Dr Crouch found that the autopsy report and slides provided no evidence of pneumoconiosis.

Conclusions of Law

Benefits are provided to miners who are totally disabled due to pneumoconiosis. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he had pneumoconiosis arising out of coal mine employment and that he was totally disabled as a result. *Gee v. W.G. Moore & Sons, Inc.,* 9 B.L.R. 1-4 (1986). Benefits are provided under the Act if the evidence establishes that the miner: 1) suffered from pneumoconiosis; 2) that such pneumoconiosis arose out of coal mine employment; 3) that the miner was totally disabled; and 4) the pneumoconiosis contributes to the total disability. § 725.202(d)(2) (2001). The failure to establish any of these four elements results in a denial of benefits. *Hall v. Director, OWCP*, 2 B.L.R. 1-998 (1980).

Existence of pneumoconiosis

A finding of the existence of pneumoconiosis may be based on chest x-rays, autopsies or biopsies, the presumption in §§ 718.304, 718.305 or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.202 (a)(1)-(4).

The regulations define pneumoconiosis broadly as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201. This definition includes not only medical, or "clinical," pneumoconiosis but also statutory, or "legal," pneumoconiosis. *Id.* Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine

employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

There are two chest x-ray films in the record. The film dated October 8, 2001 was read four times by physicians dually qualified as board-certified radiologists and B-readers. All of the physicians who interpreted this film found category two pneumoconiosis. Dr. Wiot found 2/2, t/q, but noted in a report that although a technical diagnosis it was probably not pneumoconiosis, and was more likely interstitial disease because the primary location was in base of lungs. Dr. Wiot's comments will be afforded no weight for a 718.202(a)(1) analysis. See *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (enbanc on recon.). Dr. Capiello found 2/3, q/t; Dr. Patel interpreted the film as 2/2, t/u and Dr. Ahmed found 2/2, t/q. This film is positive for the existence of pneumoconiosis. The film dated January 29, 2003 was read as 2/3, q/t by Dr. Cappiello, who is a dually qualified physician and by Dr. Zaldivar, a B-reader, as providing no evidence of pneumoconiosis. Dr. Cappiello's interpretation will be afforded greater weight due to his status as a dually qualified physician. See *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F. 3d 894 (7th Cir. 2003). This film is positive for the existence of pneumoconiosis. Therefore, the preponderance of the x-ray evidence is positive for pneumoconiosis.

Dr. Uht reported the miner's cause of death to be respiratory failure due to end stage pulmonary fibrosis. Dr. Uht found mixed dust fibrosis, but did not rule out superimposed usual interstitial fibrosis. The gross description and microscopic diagnosis listed the presence of anthracosis. Dr. Crouch reviewed the autopsy report and slides. Dr. Crouch found non-specific entrapment of dust, no definite dust macules and no nodules or lesions. Dr. Crouch determined that no evidence justified a finding of pneumoconiosis. The autopsy evidence provides conflicting opinions as to the presence of anthracosilicotic nodules or anthracosis. Therefore, I find that the autopsy evidence does not support or refute a finding of pneumoconiosis.

The enumerated presumptions are not applicable to this claim. The record contains the medical opinions of three physicians. Dr. Rasmussen diagnosed pneumoconiosis based on positive x-ray evidence and twenty years of coal dust exposure. He also diagnosed chronic bronchitis based on the miner's chronic productive cough and diffuse interstitial fibrosis based on the physical examination, and found that coal dust exposure was a major contributing factor to these diagnoses. Dr. Zaldivar found no evidence to justify a diagnosis of pneumoconiosis, and found the miner's severe pulmonary impairment was unrelated to coal dust exposure. Dr. Zaldivar fails to discuss how the miner's decades of coal dust exposure were determined not to be a contributing factor to his diagnosis of pulmonary fibrosis. See *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 1989) (en banc) (unreasoned or undocumented opinion may be given little weight); and *Warman v. Pittsburgh & Midway Coal Co*., 4 B.L.R. 1-601 (1982) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis). Dr. Zaldivar states that to "better characterize this fibrosis, a lung biopsy should be performed" in addition to a CT scan. Dr. Zaldivar's need for further testing to properly characterize the fibrosis is inconsistent with his absolute finding that fibrosis was unrelated to dust exposure. Dr. Zaldivar's report will be afforded little weight. Dr. Cohen diagnosed pneumoconiosis based on substantial "historical, physical, physiological, and pathological evidence of pneumoconiosis" and the miner's exposure history. The exclusion of

idiopathic pulmonary fibrosis as a possible diagnosis due to the miner's dust exposure history was supported by ample documentation and references. See *Church v. Eastern Assoc. Coal Co.,* 20 B.L.R. 1-8 (1996) (opinion based on more extensive information is more probative).

Taken as a whole, the medical reports, autopsy evidence and chest x-ray evidence prove by a preponderance of the evidence that Claimant had pneumoconiosis. *See Island Creek Coal Co. v. Compton,* 211 F.3d 203 (4th Cir. 2000).

Causal relationship of pneumoconiosis and coal mine employment

I find that the miner was employed in our nation's mines for a period of twenty years. Claimant is therefore entitled to the presumption in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. Dr. Wiot found that although a technical diagnosis of pneumoconiosis was required under the x-ray classification system, his interpretation of the film was more likely interstitial disease because the primary location was in base of lungs. Dr. Wiot's comments are insufficient to rebut the § 718.203 presumption.

Existence of total disability

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work. § 718.204(b)(2).

The finding of Claimant's total disability is based on the medical evidence of record. The record contains two pulmonary function studies, of which one produced qualifying values. This test was administered over a year after the non-qualifying test. The two blood gas studies produced no qualifying tests at rest, but both test were qualifying during exercise. There is no evidence that the miner had cor pulmonale.

The record contains three medical opinions regarding disability, and all of the physicians found the miner to be totally disabled.[4] Dr. Rasmussen found that the miner's "very marked loss of lung function" prevented him from performing his last coal mine employment. Dr. Zaldivar found that the miner was totally disabled form a pulmonary standpoint. Dr. Cohen found that the miner would have not been able to perform his last coal mine employment.

[4] Drs. Uht and Crouch did not opine on disability or the etiology of disability, as that their opinions were based on autopsy evidence.

Employer admits in its closing brief that the miner was totally disabled. I find that Claimant is totally disabled based on pulmonary function studies, blood gas studies and the medical opinions of record.

Causation of disability

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

Dr. Zaldivar did not diagnose pneumoconiosis, and his opinion on the cause of Claimant's total pulmonary disability is entitled to little weight. *See Scott v. Mason Coal Co.,* 289 F. 3d 263 (4th Cir. 2002). Dr. Rasmussen found coal dust exposure to be a major contributing factor to the miner's disability. Dr. Cohen found coal dust exposure to be the primary cause of the miner's disability. I find that Claimant is totally disabled due to pneumoconiosis.

The evidence establishes all the elements of entitlement. Benefits will be awarded as of August 1, 2001, the first day of the month in which the claim was filed because the evidence does not establish the month of onset of total disability. § 725.503(b). The miner died on March 11, 2004. Entitlement ceases on the month before the month of the miner's death. § 725.203 (b)(1). Therefore, the payment of benefits shall cease on February 29, 2004. Claimant's counsel has thirty days to file a fully supported fee application and her attention is directed to §§ 725.365 and 725.366. Employer's counsel has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT Continental Mining Company, Inc and the West Virginia Coal Worker Pneumoconiosis Fund:

I. Pay Claimant's surviving spouse all the benefits to which she is entitled, augmented by one dependent, beginning as of August 1, 2001 and ending February 29, 2004;

II. Pay Claimant's surviving spouse all the medical benefits to which she is entitled beginning as of August 1, 2001 and ending February 29, 2004;

III. Reimburse the Black Lung Disability Trust Fund for interim payments made to Claimant; and

IV. Pay interest to the Black Lung Disability Trust Fund on unpaid benefits at the rates set forth in § 725.608.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601***. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.